BORA LASKIN LAW LIBRARY
3 1761 03324 3551

FACULTY OF LAW

UNIVERSITY OF TORONTO

and

LAW SCHOOL

DALHOUSIE UNIVERSITY

MATERIALS ON CONFLICT OF LAWS

VOLUME I

September 1992

John Swan

Aird & Berlis
Toronto

Vaughan Black

Dalhousie University
Halifax

DONA LAUDIS LAW LIBRARY
DEC 21
FACULTY OF LAW
UNIVERSITY OF

BORA LASKIN LAW LIBRARY
UNIVERSITY OF TORONTO

FACULTY OF LAW

UNIVERSITY OF TORONTO

and

LAW SCHOOL

DALHOUSIE UNIVERSITY

MATERIALS ON CONFLICT OF LAWS

VOLUME I

September 1992

John Swan

Aird & Berlis
Toronto

Vaughan Black

Dalhousie University
Halifax

We are grateful for the help of many students over the past many years in the constant revisions in the organization and text of these materials.

These materials are for use by students in the Faculty of Law, University of Toronto, and Dalhousie Law School and by students in other universities to which these materials have been distributed. The materials are not otherwise for publication or commercial sale. All rights reserved.

Digitized by the Internet Archive
in 2018 with funding from
University of Toronto

https://archive.org/details/materialsonconfl01swan_14

Table of Contents

INTRODUCTION

1. The Questions Central to the Conflict of Laws 1

2. Note on the Materials 4

3. The Purpose of the Materials 8

4. Note on Uniform Laws 11

5. What is a "Conflicts" Problem? 15

Pleadings; Statement of Claim 17

Statement of Defence 18

Reply 18

PART A

I CHOICE OF LAW

Chapter One

1. Introduction 20

2. The Choice of Law Process 22

3. The Structure of Conflicts Analysis 23

Table 1 27

Chapter 2

Choice of Law in Contract

A Note on the Historical Development of the Choice of Law Process . . . 32

Etler v. Kertesz 37

Notes 44

The Assunzione 48

Questions and Notes 51

Amin Rasheed Shipping Corporation v. Kuwait Insurance Co. 54

Notes 61

The Effect of an Express Choice of Law Clause 67
Vita Foods Products Inc. v. Unus Shipping Co. Ltd. 67
Questions and Notes 72
International Sale of Goods Act, 1988 77
Some Further Problems of Choice of Law in Contracts 78
Ross v. McMullen 81
Questions and Notes 84
Review and Further Examination of Typical Cases 88
Bondholders Securities Corp. v. Manville 89
Notes 91
Charron v. Montreal Trust 92
Notes 95
Imperial Life Assurance Co. v. Colmenares 96
Notes 100
Ralli Brothers v. Compania Naviera Sota y Aznar 103
Notes and Questions 106

Chapter 3

Choice of Law in Torts

Introduction 109
A Summary of the Development of Modern Tort Choice of Law Rules . 112
The "First Rule" in *Phillips v. Eyre* 115
The "Second Rule" in *Phillips v. Eyre* 118
Chaplin v. Boys 120
Questions and Notes 132
McElroy v. McAllister 133
Notes and Questions 134
McLean v. Pettigrew 135
Notes 139
O'Connor v. Wray 141

Notes 146
Grimes v. Cloutier 150
Prefontaine v. Frizzle; Cuddihey v. Robinson 163
Notes and Questions 165
Tolofson v. Jensen 167
Draft Foreign Torts Act 176
The Insurance Context 177

Chapter 4

Escape Devices

1. Introduction 181
2. The Substance/Procedure Distinction 181
Table 2 182
Toronto-Dominion Bank v. Martin Estate 184
Alberta Treasury Branches v. Granoff 189
Notes and Questions 192
Block Bros. Realty Ltd. v. Mollard & Detra Holdings Ltd. 192
Questions and Notes 197
J. D'Almeida Araujo v. Sir Frederick Becker & Co. Ltd. 201
Questions and Notes 205
3. Renvoi 207
Re Annesley 211
Notes and Questions 213
4. Characterization 215
Haumschild v. Continental Casualty Company 217
Levy v. Daniels' U-Drive Auto Renting Co. 221
Notes and Questions 223

II JURISDICTION, RECOGNITION AND ENFORCEMENT

Chapter 5

Jurisdiction of the Ontario Court

Introduction 227

Rules Excluding the Jurisdiction of the Courts 231

1. **Personal Exclusions** 231

2. **Subject Matter Exclusions** 232

Hesperides Hotels Ltd. v. Muftizade 234

Notes and Questions 239

Other Restrictions on Taking Jurisdiction 243

1. **Forum Inconveniens** 243

Moreno v. Norwich Union Fire Insurance Society Ltd. 244

Notes 247

Spiliada Maritime Corp. v. Cansulex Ltd. 248

Notes 260

2. **Contractual Limits on Forum Selection** 262

Service *Ex Juris* 265

Ontario *Rules of Civil Procedure* 266

Moran v. Pyle National (Canada) Ltd. 269

Notes and Questions 278

Robinson v. Warren 278

Notes 280

Note on Actions and Judgments *In Rem* 282

Mareva Injunctions 283

Mareva Compania Naviera S.A. v. International Bulk Carriers S.A. 283

Derby & Co. Ltd. v. Weldon et al. (No. 4) 287

Aetna Financial Services v. Feigelman 297

Notes 306

Anti-suit Injunctions 305

Amchem Products Inc. et al. v. Workers' Compensation Board et al. 307

Notes and Questions 316

The Constitutional Component 317

World-Wide Volkswagen Corp. v. Woodson 318

Questions and Notes 326

Chapter 6

Recognition and Enforcement of Foreign Judgments

Introduction 329

Recognition and Enforcement; The Common Law Rules 330

Henry v. Geoprosco International Ltd. 340

Notes 341

Black-Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg A.G. 343

Notes 348

De Savoye v. Morguard Investments Limited et al 348

Notes and Questions 366

Clarke v. Lo Bianco 367

Minkler and Kirschbaum v. Sheppard 370

Notes 374

Judgments that will be Refused Enforcement 382

1. **Public Policy** 382

Boardwalk Regency Corp. v. Maalouf 382

Notes 396

2. **Foreign Tax Claims** 396

3. **Foreign Penal Claims** 399

Huntington v. Attrill 399

Note 402

4. **Foreign Judgments Concerning Land** 403
Duke v. Andler 403
Questions and Notes 406
Statutory Provisions and International Agreements 408
1. **Provincial Statutes** 408
(a) Reciprocal Enforcement Legislation 408
Reciprocal Enforcement of Judgments Act 408
Note 411
Uniform Enforcement of Canadian Judgments Act 412
Note 415
(b) Arbitration Awards 416
Schreter v. Gasmac Inc. 419
Notes 428
(c) Other provincial Legislation 428
2. **Canadian Statutes and International Agreements** 431

As a result of the strong civilian tradition in the theory of Conflicts, the phrase "Private International Law" is sometimes used even in the common law. We say, "even in the common law", for the common law has always been strongly xenophobic, and only in Conflicts is there any trace of a significant civilian influence. At least since the time of Austin (*The Province of Jurisprudence Determined*, 1859) common law lawyers have always been very condescending towards international law. They took (and still largely take) the view that it is not real "law" because it lacks that which is essential to the positivist view of law, *viz.*, a sovereign or sanctions. The Canadian law of contracts, torts, and, to a much smaller degree, family law, etc., remains based on the rules and approaches of the common law, and except where there has been legislative intervention, the roots of the law can be traced back for centuries.

2. NOTE ON THE MATERIALS

As is usual in the materials that you see in law school, a large proportion of these materials consists of extracts from judgments. There are a number of reasons that help to explain this fact. The most obvious is the easy access that we have to the judgments of the courts. We shall try to reduce the effect that this fact might have on your attitude to the materials by offering examples of statutes, clauses taken from contracts, other kinds of agreements and arrangements that are not based on any agreement to illustrate the work of the solicitor who is planning his or her client's affairs with an eye to the possibility of there being a conflicts problem in the future. It is inevitable that the number of pages taken up with such examples will be far less than the number taken up with extracts from judgments, but we ask you not to underestimate the importance of the planning function of the lawyer and to keep its importance always in mind. We shall emphasize examples of legislation that either exists to avoid some problem of the common law of conflicts, or makes use of conflicts rules to achieve its end.

We make no claim that we shall do something that is radically different from any other course. All that we can say is that we do not want to do anything other than help you to understand a body of law that is nothing if it is not confusing and seriously misunderstood. To understand why the law is as it is and the origin of some of the rules we shall consider (and to give you a basis for any research that you might have to do) we use the smallest (though still a distressingly large) number of cases that we think will illustrate these points. We shall include a number of articles or extracts from articles.

As in every other area of the law you must be wary of the focus on judgments and on the role of the litigator, for it makes the work of the "court-room" lawyer appear to be more important than it really is. We shall always have to consider what lessons the judgments have for the solicitor who is trying to keep his client out of trouble, and especially out of litigation—clients have a

most deplorable dislike of getting involved in litigation, an attitude that does nothing for the prosperity of the legal profession. Reading judgments in an effort to plan around the rules that they suggest is both more difficult and more central to the lawyer's function than is the use of judgments as the basis for arguments in a dispute.

We shall spend a significant amount of time examining the contributions of academics to the development of the law. The role of the academic in the development of both the rules and the theoretical structure of the conflict of laws, and the importance of what the academics have created makes a focus on what they have said of great importance. Consistently with what we have said about the use you should make of judgments, we shall assess the usefulness of the academic contribution to see what guidance that contribution gives to either the barrister or to the solicitor who has to deal with the pressing and mundane problems of clients.

The judgments that we shall examine are almost entirely from courts in common law jurisdictions. The contributions of the academics are taken exclusively from those writing in the same tradition. This focus is not the result of either chauvinism or xenophobia: it is justified by the simple fact that we have enough to occupy our time with what we have to examine, and a wider focus would only be useful if we could develop an understanding of a fundamentally different concept of law, of the role of the courts in its development, and of rules which are based on political and social ideas that may have little relevance to the common law world. The language problem is another difficulty we can do little about. We shall see enough of the rules of civilian jurisdictions to catch a brief glimpse of both the conceptual gulf that often divides us from that world, and of the fact that radically different legal regimes will nearly always resolve similar problems in the same way, so that however large the difference in starting positions may be, it frequently means very little in the actual results reached in the cases.

There are, however, problems where the differences between the competing jurisdictions are so fundamental and pervasive that it is not at all clear that any kind of accommodation is possible. We shall, for example, look at the problem of the adoption of native children by non-native adoptive parents in Volume III of these materials. Here we find that something that we might assume to be as self-evident as that the decision whether the child should stay with his or her adoptive parents or go back to his or her natural parents or to a native relative should be based on what is in the child's best interest may not be accepted by all those involved. What we may call the "western" concept of personality—the individual alone is the focus of rights and obligations—provides a focus that makes the individual important. This view, too, may be challenged by the view that what is important is not the individual but the band or group. To make matters even worse, there may be no decision making process that will be acceptable to everyone. The dispute resolution

mechanism characterized by adjudication with the opportunities that it provides for participation by those affected may not be acceptable to those who believe in the need for consensus or in group decision-making processes. Yet few would deny that the problem that our example has raised and which has to be decided is, to say the least, of transcendent importance for everyone involved. How, or how well, the law can resolve a problem of this type will test the limits of our imagination. What this kind of problem will force us to do is to stand far enough back from our assumptions and those beliefs and values that we think are "natural" or "obvious" to see that they may be neither. For the moment, the problems we shall examine raise much less difficult problems. The materials will, we hope, bring out the problems that different legal, social and cultural systems may present.

It is hard to know where to look for really useful material to explain the issues and problems of conflicts. As we shall see, any extensive focus on the work of the courts will create problems for any analysis that we might try to develop, for the courts do not have as extensive an experience in this area as they do in areas like contracts, tort or property. In other words, the courts simply do not have to decide that many conflicts cases compared with those in the other areas of the law. There is, of course, the point we have just made that the courts themselves may be as much part of the problem as they are of a solution.

The work of the academics occasionally explains what the problems are or what the courts are doing, but more often, offers extensive criticism of what either the courts or other academics do or say, and suggests solutions which, if adopted by the courts, are frequently flawed, or which are objectionable on more theoretical grounds. In other words, the search for workable and sound rules is very difficult, and both our imagination and legal skills will be tested in the effort to find such rules.

There are a number of reasons for the fact that the courts hear so few conflicts cases, but among the more important is the instinctive horror of most practising lawyers for conflicts issues—perhaps justified and explained by their general ignorance of the area. One result of this feeling is that either a conflicts case, i.e., a case in which the lawyers involved see that there are possibly relevant foreign facts, is not litigated with the result that many potential conflicts cases never get brought before the courts, or if such a case does get litigated, both courts and counsel may conspire to hide the conflicts aspects. Lawyers sometimes simply fail to perceive the conflicts issues in cases they are working on.

Perhaps things will change. Canada has recently adhered to important international conventions regarding international trade. One such convention relates to arbitrations and the enforceability of foreign arbitral awards. Another relates to the international sale of goods. Others deal with the very

serious problem of inter-jurisdictional child abduction. The provinces have introduced legislation to implement these three conventions.[5] Ontario now has, for example, the *International Commercial Arbitration Act*, R.S.O. 1990, c. I.9, the *International Sale of Goods Act*, R.S.O. 1990, c. I.10 and the *Children's Law Reform Act*, R.S.O. 1990, c. C.12, ss. 40-46 (incorporating the *Convention on Civil Aspects of International Child Abduction*). It is too early to know if this legislation will have any impact on the extent to which Ontario courts will be involved in international litigation. One result of the *International Commercial Arbitration Act* may be that the number of international arbitrations in this country may increase, and that, in consequence, the number of cases brought before the courts may be reduced. It is impossible to discover how many contracts provide for arbitration: solicitors and clients generally favour arbitration; litigators generally oppose it; recent Ontario legislation, the *Arbitration Act, 1991*, S.O. 1991, c. 17, strongly encourages it. Up to now it may be assumed that if an international commercial agreement, e.g., a contract for the international sale of goods or for carriage now provides for arbitration, it will usually provide for arbitration in London, Paris or New York. The courts of British Columbia have had the largest number of international cases of any Canadian court.

There are some international arbitrations in Canada—the arbitration over the price of coal sold to Japan by Quintette Coal Limited (mentioned below) being one of the first—but very few in comparison with those in some other countries. Some idea of the scale of arbitration in London, for example, is provided by the fact that over 50,000 appointments of arbitrators are made in London each year and over 10,000 awards are given. Another illustration of the same fact is that all but one of the international contracts cases coming before the House of Lords, and reported from [1971] A.C. to [1983] A.C., that involved a dispute between the two parties to the contract, was preceded by arbitration. In contrast, no case before the Federal Court of Canada since its creation in 1972, until 1985 has been preceded by arbitration. The Federal Court is relevant for comparative purposes because many international contracts involve charterparties and international bills of lading that come within the exclusive jurisdiction of that Court. All of the cases in the House of Lords would have come before the Federal Court had they been litigated in Canada. The legislation applicable to matters that might end up in the Federal Court would probably not be a provincial *Arbitration Act* but the federal act, the *Commercial Arbitration Act*, R.S.C. 1985, c. 17 (2nd Supp). This act applies only to matters where at least one of the parties is the federal crown, a departmental or Crown corporation or in relation to maritime or

---

5 In Canada the federal government has, under the *Constitution Act, 1867*, the power to enter into international treaties or agreements. As the "free trade" debate illustrated, that power may not extend to the enactment of legislation to bring the treaty into effect.

admiralty matters (s. 5(2)). The federal parliament would not have jurisdiction to enact a general arbitration act.

There is an International Arbitration Centre in Vancouver financed by the provincial government, though the volume of business that it has done, in spite of its location in one of the most scenically attractive sites in the city, is not yet large. The Ontario government had plans to develop and support a similar centre in Toronto, but we do not know what has become of them. So far as we are aware, there has been no significant increase in the number of international arbitrations as a result of the federal and provincial legislative changes or other efforts. The arbitration that took place over the agreement for the sale of coal from the Quintette mine in British Columbia to the Japanese steel mills was the first large-scale international commercial arbitration in this country. It is doubtful if the experience of the parties, particularly the Japanese, was such as to make international arbitration in Canada very attractive to foreigners.

We shall very briefly examine the issues in international (and interprovincial) arbitrations later in the materials.

3. THE PURPOSE OF THE MATERIALS

The purpose of our examination of these materials is to achieve an understanding of the Conflict of Laws. It is worth pausing for a moment to consider what an understanding of Conflicts looks like. In other words, what should you get out of an examination of these materials or of a course on Conflicts? There are two goals that these materials are designed to achieve. The first goal is an understanding of how the law is conventionally organized: What concepts or doctrines are regarded as providing guides? What are the rules applied by the courts?

The second is the more difficult part. We ask now if the rules are truly useful as predictions of what the courts will do. Do the rules mask or obscure the real reasons for the decision? Are there any principles that provide a better basis for understanding what the courts will do or what they should do? An understanding of the second kind is not mere academic fluff from the point of view of the hard-nosed practising lawyer. It provides the only sound basis on which he or she can advise his or her client, and often it provides the means for rescuing a client from the consequences of thoroughly unsatisfactory doctrine. It provides a basis for an informed and creative sense of what is fair and of what justice consists.

The traditional method of analysis adopted by the Canadian courts has been almost exclusively based on the decisions of English judges and the writings of English academics. This approach, though at times pragmatic in orientation, is heavily characterized by a conceptual analysis. One explanation of

first two questions that were posed, and on the first part of the question that has just been asked.

It is part of the purpose of this course to show you what the courts and academics are now doing in conflicts cases. This is an extremely important part of the course. It is essential to know the basis from which the courts are likely to reason, or, at least, to begin to reason. We start, therefore, by examining in each area of the course the traditional and generally accepted rules. Once these have been explored it is both possible and profitable to explore the issues raised by the cases more fully.

The course materials deal principally with four areas of law in which conflicts problems arise: the substantive areas of contracts and torts and the procedural issues of jurisdiction and the recognition and enforcement of foreign judgments. The problems are by no means limited to these areas, however, and there are many other areas where interesting developments are occurring. These areas include corporate law (for example, securities, anti-trust law), commercial law (or more specifically, conflict of laws and the law of international sales, secured transactions, bills of exchange or letters of credit) and international bankruptcy or insolvency—as the insolvency of the Maxwell and Reichmann groups vividly illustrate.

4. NOTE ON UNIFORM LAWS

An important recent development that will not, however, be extensively explored in this course, are various proposals to produce an international uniform law on certain topics. It is generally accepted that conflicts problems would disappear if there were uniform rules in all relevant jurisdictions. (The validity and effect of this assumption will be more closely examined later. The automatic acceptance of both the assumption and the desirability of uniform laws is one of the more difficult problems we face in developing our approach to Conflicts.)

There is, of course, uniformity of laws in many areas of the law. In Canada, all the common law provinces have *Sales of Goods Acts* that are very nearly uniform.[6] Similarly, the *Uniform Commercial Code* in the United States

---

[6] Proposals to change the act are unlikely to be implemented by one province without an understanding from each of the others that their acts would be similarly changed. The recommendations of the Ontario Law Reform Commission regarding the *Sale of Goods Act* were taken up by the Uniform Law Conference of Canada which produced a draft act for enactment by all the provinces that differs from the original Ontario proposal. See *Report of the Ontario Law Reform Commission on Sale of Goods*, 1979 and *Uniform Sale of Goods Act*, Proceedings of the Uniform Law Conference of Canada, 1981. The Uniform Law Conference of Canada has had a continuing interest in the problems of the Conflict of Laws and has produced a number of draft acts, some of which have been adopted as solutions to various conflicts problems. See. e.g., the *Reciprocal Enforcement of Maintenance Orders Act* in its various forms in the Proceedings of the Conference over many years and, more

> Finally [counsel for the plaintiff] alternatively argued that if this transaction is hit by reg. 2 none the less the plaintiff ought to be entitled to recover on the principle of unjust enrichment and he referred to and relies on the speech of Lord Wright in the *Fibrosa Spolka Akeyjna v. Fairbairn, Lawson, Combe Barbour Ltd.*, [1943] A.C. 32, 61, where in dealing with the doctrine of unjust enrichment the noble and learned Lord says: "The gist of the action is a debt or obligation implied or more accurately imposed by law in much the same way as the law enforces as a debt the obligation to pay a statutory or customary impost." It must be remembered that in that case Lord Wright was dealing with a contract lawful when but the performance of which had become impossible and the consideration for which had accordingly failed. But it is said that the transaction in the present case comes within the language which was there used in dealing with this kind of action and that it should be applied in the present circumstances. It is to be observed that in the present action there is no claim whatever based upon fraud or tort, or any alternative claim grounded on any implied obligation imposed by law or otherwise, and if, as I think, this transaction was one forbidden by reg. 2, and binding on a British subject abroad, it would—as [counsel for the defendant] very forcibly says—be a curious result if we were compelled to say that the law imposed a debt or obligation which had been expressly prohibited by a statutory enactment to which this court is bound to give effect. I think the whole notion of a debt or obligation imposed by law, as contemplated by Lord Wright in the *Fibrosa* case (*supra*), is alien to a transaction of the kind with which we are dealing, where the regulation, which has the force of law, has, in terms, prohibited the particular transaction.
>
> The appeal should therefore be allowed, and judgment entered dismissing the action.
>
> In view of the fact that the defendant has enjoyed the benefits of the transaction which was entered into as a favour to him, there should be no costs to the defendant of the trial or the appeal.

NOTES

1. As was mentioned earlier, the determination of the content of any foreign law is a question of fact. It is proved by expert witnesses. As the judgment of Porter, C.J.O., indicates, only a person who is entitled to practise law in the jurisdiction is entitled to give evidence as an expert. (Academics and judges from the foreign jurisdiction are occasionally, as a mark of especial favour and esteem, allowed to appear as experts in some foreign law.) The origin of this rule is, once again, distant. It arises out of a legal system that existed in a state which differed from Canada and with an attitude to law

which we no longer hold. As we have said, the origin of our conflicts rules was English law. England is regarded as unitary state—to the occasional rage of the Scots—even though the separateness of the Scottish legal system gave the law of the United Kingdom some of the aspects of a federal state. English law, i.e., the common law, has exhibited over the centuries more than a little xenophobia. The common law has often been proud of its independence of the contagion of the Roman law. This independence is frequently obvious in judgments on issues of procedure, and matters of evidence are often the essence of procedure.

2. It is odd, to say the least, that an Ontario judge can look at a case from Nova Scotia or British Columbia (as is done every day) to find out what *Ontario* law might be, but not for the purposes of finding out what *Nova Scotia* or *British Columbia* law might be. A trial judge who says that she can read Nova Scotia cases and statutes as well as or better than the expert called to testify on Nova Scotia law may get her knuckles rapped by the Court of Appeal. (See, e.g., *Lear v. Lear* (1974), 5 O.R. (2d) 572; 51 D.L.R. (3d) 56 (C.A.)). The absurdity of requiring expert evidence of Ontario law in a Nova Scotia court, and *vice versa* has been recognized by amendments to the *Evidence Acts* of several provinces. See, e.g., the *Nova Scotia Evidence Act* R.S.N.S., 1989, c. 154, s. 3(3), the Manitoba *Evidence Act*, R.S.M., c. E-150, s. 31 and the British Columbia *Evidence Act*, R.S.B.C., 1979, c. 116, s. 26. Ontario, Alberta and Newfoundland have no such provisions, though recommendations for such a change have frequently been made. Even in provinces which have provisions in their evidence acts requiring courts to take judicial notice of the statutory law of other provinces the courts have not construed those provisions widely. It is still incumbent on one of the parties to raise the issue of the possible applicability of foreign law. Courts do not take judicial notice of the statutes of other provinces in the way that they can take judicial notice of their own province's statutes (i.e., by considering those statutes even though the parties may not have pleaded them). See *Archie Colpitts Ltd. v. Grimmer* (1978), 27 N.S.R. (2d) 341, 41 A.P.R. 341, 83 D.L.R. (3d) 281, (N.S.S.C., A.D.).

3. The choice that the court faced in *Etler v. Kertesz* was whether the law of Switzerland or Austria *governed* the problem facing the court. As we saw, the answer to this question was determined by asking which jurisdiction had "the closest and most real connection" to the transaction. This question was answered by considering the geographical facts surrounding or arising in the transaction. The rule that one drives from *Etler v. Kertesz* is that the determination of the "proper law" in a *contracts* case is to be made by considering the jurisdiction with which the contract has its closest and most real connection.

4. Because the choice of law rules for torts or any other area are different, it becomes extremely important to know whether we are dealing with a contracts case or some other kind of case. Porter, C.J.O., does not have to worry much about the problem of "characterizing" the case as a contracts case: he more or less assumes that the contracts approach is the right one. As was emphasized in the Introduction to the choice of law process in Chapter 1, this process of characterizing or classifying the problem is, of course, an integral part of any thinking about law. A lawyer has to know, for example, whether he or she looks in the *Canadian Abridgement* or one of the digest under "Contracts" or under "Criminal Law" for the answer to the problem. When the process becomes, not a way of organizing one's thoughts so that one can begin to think about the problem one faces, but a crucially important stage in the legal analysis, odd things begin to happen. We are all familiar with the difficulties caused by the need to project distinctions on to facts that do not support them. Is this an offer or something else? Is this a condition precedent or something else? Is this person an invitee or licensee? Is this a sale of goods or something else? Is this thing a fixture or something else? There are, of course, paradigm cases, but the hard cases do not submit easily to analysis. We would be horrified if decisions on these questions were made by flipping a coin, and in hard cases, we try to find a satisfactory answer by asking what it is that we are trying to do.

5. The process of characterization is central to the inquiry into choice of law questions. Its importance is increased because, in general, the choice of the governing law results in its application to *every* issue that can arise. Such an approach is called a "jurisdiction-selecting" approach. We choose between the whole of Swiss or Austrian law, *not* between *a single rule to deal with the particular dispute* derived from Swiss or Austrian law. If we adopted this latter approach in respect of the issues arising in *Etler v. Kertesz*, we would consider the particular provisions of those laws as they had an impact only on the question of the enforceability of a contract tainted with illegality arising from a breach of exchange control regulations in one of the two countries involved.

6. Once the question of characterization has been determined, the remaining questions in the traditional choice of law process are also answered in the abstract. That is, the choice between Swiss law or Austrian law is made before the court (formally) considers the application of the particular rule in the facts of the case. The court is aware, of course, that, as the pleadings set out above disclose, each party is arguing that the law of one jurisdiction applies rather than another, and that the parties expect, at least, that the choice will determine the case in favour of one side or the other. As Professor Castel writes: (*Canadian Conflict of Laws*, 2nd ed. p. 29)

> The relevant conflicts rule of the forum enables the court to select the law of a particular country or jurisdiction applicable to that legal category or issue

> without first having to ascertain how that law would decide the case. The jurisdiction-selecting choice of law rule makes a state or country the object of choice. It does not consider the contents of the applicable law. Such a method is simple and easy to apply. It achieves certainty although it does not always achieve justice.

7. In *Etler v. Kertesz* there was no express choice of the governing law. When the notion that contracts, or speaking more precisely, the binding force of contracts, derived from an exercise of human will became fashionable in the middle of the nineteenth century, it was thought necessary to justify doing anything that the parties had not expressly agreed to by finding an "implied term". Such a term would be to the effect that the parties would have agreed to what the court wanted to do if they had thought about it. One of the best examples of such reasoning can be found in the judgments of the court in *Taylor v. Caldwell* (1863), 3 B.& S. 826, 122 E.R. 309, (the "Music Hall" case) where the court justified its decision to regard the contract as frustrated on the ground that it could find an implied term in the contract. It was held that such a term provided for the mutual discharge of the parties in the events that had happened. This method of reasoning was consistent with the underlying theory of contracts at that time. No account was taken of the logical and economic (or simple fairness) problems of imposing on the parties a decision, ostensibly based on the terms of their agreement, that *ex hypothesi*, they had not thought about. No account was taken, or could be taken of the kind of bargain that might have resulted had the parties, or their legal advisers had the forethought to consider how the loss arising from the destruction of the music hall would be allocated.

8. As the will theory declined in popularity and was replaced (at least as regards the law of frustration) by a more forthright allocation of the risk of loss as the court thought fair in the circumstances, so too in conflicts it was seen as less necessary to justify the decision to "find" a choice of law term in the contract. The Court of Appeal in *Etler v. Kertesz* had accepted the more objective theory of contracts and, while referring to the implicit choice cases, preferred a more objective formulation of the proper law. It is, of course, as unclear in conflicts cases as in contracts cases generally, whether it makes any difference to the actual result what theory the court adopts. The advantage of a more objective theory may lie in its more open acceptance of the court's role in the allocation of the risk of loss. Such openness is likely to lead to a greater degree of predictability.

9. The following case is, perhaps, best understood as being a caricature of the traditional approach.

> I regard the incorporation of the Institute clauses, with express reference to English law provisions, as important. Wit no great confidence, and reluctantly differing as to the ultimate conclusion from Bingham J. and Robert Goff L.J., whose reasoning in principle I approve and follow, I have reached the conclusion that English law is the proper law of this particular contract.
>
> The other judges agreed with Lord Diplock.

NOTES

1. The judgments in the *Amin Rasheed* case have been reproduced at length for two reasons: (a) the discussion of the traditional choice of law process in contracts is good, and provides an excellent illustration of how that process should be undertaken; and (b) the issue of whether an "international" or "unlocalized" law of contract can or should exist is an important issue to which we shall return. When we do, it will be important to assess carefully the validity of the arguments that Lord Diplock and Lord Wilberforce use to deal with the issue, and we shall have to examine their judgments again. Lords Wilberforce and Diplock are probably the best two judges in the English tradition of the common law of conflicts. As we shall see, it is necessary to separate the English from the American tradition, and this separation can be most fairly done by focusing on what is the best in each tradition.

2. You will have noticed in the cases that we have looked at that frequent references have been made to contracts where the parties have made an express choice of the law to govern their contract. We shall deal with the cases where there is such a clause in the next section.

3. The following statement of the rules offers a convenient summary of the traditional method for dealing with the choice of law problem in contracts set out in the preceding cases, and including those rules where there is an express choice of law clause in the contract.

Dicey & Morris

Rule 180:

> The term "proper law of a contract" means the system of law by which the parties intended the contract to be governed, or, where their intention is neither expressed nor to be inferred from the circumstances, the system of law with which the transaction has its closest and most real connection.

Rule 181:

> The formation of a contract is governed by that law which would be the proper law of the contract if the contract was validly concluded.

Rule 182:

> An individual's capacity to enter into a contract is governed by the system of law with which the contract is most closely connected or by the law of his domicile and residence.
>
> (1) If he has capacity to contract by the system of law with which the contract is most closely connected, the contract will (*semble*) be valid so far as capacity is concerned.

[Note, *semble* means "it appears" and indicates a degree of caution and conservatism in stating the law seldom found in texts today. It indicates that there is, in the author's opinion, no direct authority on the point.]

> (2) If he has capacity to contract by the law of his domicile and residence, the contract will (*semble*) be valid so far as capacity is concerned.

Rule 183:

> The formal validity of a contract is governed by the law of the country where the contract is made (*lex loci contractus*) or by the proper law of the contract. (1) Any contract is formally valid which is made in accordance with any form recognized by the law of the country where the contract is made (which form is called the local form), whether or not it is made in accordance with the form prescribed by the proper law of the contract. (2) Any contract is formally valid which is made in accordance with any form required, or allowed, by the proper law of the contract, even though not made in accordance with the local form.

Rule 184:

> The material or essential validity of a contract is . . . governed by the proper law of the contract.

Rule 185:

> The interpretation of a contract is to be determined in accordance with the proper law of the contract.

Rule 186:

> (1) The effect of a contract, i.e., the rights and obligations under it of the parties thereto, is to be determined in accordance with the proper law of the contract.
>
> (2) In the absence of evidence that the parties intended another law to apply, the mode of performing a contract, as distinct from the substance of the obligation, is governed by the law of the place at which the obligation is to be performed.

Rule 187:

> The discharge of a contract normally depends upon the proper law of the contract.
>
> (1) A discharge in accordance with the proper law of the contract is valid and effective in England.
>
> (2) A discharge not in accordance with the proper law of the contract is not valid or effective in England.

THE EFFECT OF AN EXPRESS CHOICE OF LAW CLAUSE.

Standard contract drafting, i.e., the precedents that most firms use for their agreements, contain a "governing law clause". Such a clause is often in something like the following form:

> The parties hereto agree that this contract shall be governed by the laws of the Province of Ontario and the laws of Canada applicable therein.

Sometimes the clause will be more elaborate:

> The parties hereto agree that the interpretation and construction of this contract shall be governed by the laws of the Province of Ontario and by the laws of Canada applicable therein.

As we shall see, the scope of a choice of law or "governing law" clause is, in theory or is assumed to be, complex. In practice it is very simple.

The next case is one of the "leading cases" in the contracts area of conflict of laws. In particular, it is authority for the rules to govern the choice of law in the event that the parties have actually made an express choice of the governing law. While the case is generally regarded as an important case - judged at least by the number of times that it is cited—it is not at all clear why the case should be so regarded. As you read the case try to determine what the case actually decided. Is it a case where the geographically complex facts were relevant to the issue? If not, why should the case be regarded as a "conflicts" case?

Vita Food Products Inc. v. Unus Shipping Co. Ltd.
[1939] A.C. 277, [1939] 1 All E.R. 513, (P.C.)

> The judgment of their Lordships was delivered by LORD WRIGHT:
>
> This appeal arises out of a claim made against the respondent, . . . the owner of a motor vessel, *Hurry On*, registered at the Port of Halifax, Nova Scotia. The claim was made by the appellant, . . . for damage and loss

> Apart from marriage and marriage settlements in which situations capacity is regulated, broadly speaking, by the *lex domicilii*, there is no clear decision whether capacity to contract is to be tested by the *lex loci contractus* or the *lex domicilii*. Examples could be given on particular instances of the unfairness and unreality of applying one law or the other. To vary the facts of the instant case, let us assume the spouses had both been domiciled and resident in Quebec and had come to Ontario for a short visit during which an agreement under consideration was made; upon such assumption, in my opinion, it would be against common sense to decide the parties' capacity by Ontario law. In the present case, the marriage had taken place in Ontario and for many years thereafter and until the date of this agreement the parties had cohabited in Ontario. It would be unrealistic in the circumstances here to apply Quebec law in deciding the parties' capacity. The solution to this problem, in my opinion, is that adopted by the learned writers on private international law and to decide that a party's capacity to enter into a contract is to be governed by the proper law of the particular contract, that is the law of the country in which the contract is most substantially connected: Cheshire, Private International Law, 5th ed., pp. 221-4, Dicey's Conflict of Law, 7th ed., pp. 769-774; Falconbridge Conflict of Laws, 2nd ed., pp. 383-5. In this case there is no doubt that the proper law of the agreement was the law of Ontario, and by that law, neither party to the agreement lacked the necessary capacity. Therefore, I agree with the learned Chief Justice's statement that "the contract is a good enforceable contract under the law of Ontario".

NOTES

1. *Charron v. Montreal Trust* is regarded as very good authority for the common law choice of law rule that we have seen being developed by the courts. It is consistent with the underlying theory of conflicts that the same rule should be applied to test the validity of a separation agreement, an international contract of marine insurance, a loan, an agreement to split real estate commissions and an ocean bill of lading. It is important that you accept that the traditional approach to choice of law does not concern itself with the nature of the contract in issue and, indeed, that such an inquiry has no place in the analysis: a contract is a contract is a contract . . . .

2. The case of *Charron v. Montreal Trust* raises a fundamental problem of the conflict of laws, one that we shall examine in more detail later in the course, particularly in the context of matrimonial property and succession.

3. Consider what the result in *Charron* would have been in the issue in the case (the right of the wife to claim the arrears of maintenance under the separation agreement from her deceased's husband's estate) had been characterized as a "succession case". If that characterization had been made, the choice of law rule would have been that the law of the deceased's domicile at the date of his death governed the analysis.

4. On the assumption that the husband left an estate of $50,000, and that half went to his wife because of the application of the Québec rules regarding matrimonial property, the other half, we can assume, going either to the children of the marriage or being disposed of by the husband by will, calculate the absolute amounts that the wife and any other beneficiary would get under (i) the result of the case, and (ii) if Québec law had been held to apply.

5. Now calculate what the wife would have obtained if the whole estate and every question of succession were governed by Ontario law.

6. What do these results suggest about the justification for the decision of the Ontario Court of Appeal?

Imperial Life Assurance Co. v. Colmenares[8]
[1967] S.C.R. 443, 62 D.L.R. (2d) 138
(S.C.C., Cartwright, Fauteux, Martland, Ritchie & Spence JJ.)

The judgment of the Court was delivered by

RITCHIE J.:— This is an appeal brought with leave of this Court from a judgment of the Court of Appeal for Ontario, (Porter C.J., dissenting) dismissing and appeal from a judgment of Mr. Justice Stewart whereby he awarded the respondent the sum of $8,744.22, being the equivalent in Canadian currency of the cash surrender value, payable in American dollars, of two policies of insurance on the life of the respondent which were issued through the appellant's branch office in Havana, Cuba, in 1942 and 1947 at a time when the respondent was resident and domiciled in that country.

The sole question at issue in this appeal is whether the proper law of the contracts of life insurance is the law of Ontario or the law of Cuba. In this regard the parties are agreed that if the proper law of the contracts is found to be that of Ontario, the respondent is entitled to succeed, but that if the law of Cuba applies, unless permission has been granted by the National Bank of Cuba, the payment of the cash surrender value in dollars to a person resident in the United States, as the respondent is and was in September 1961 when he surrendered the policies, would be an offence contrary to the *Foreign Exchange Contraband Law* of Cuba.

. . .

The two policies here in question were in identical terms and they were both written in Spanish, which is the language of Cuba, for delivery by the appellant's Cuban agent to the respondent who was then a Cuban national

---

[8] The plaintiff's, respondent's, name is incorrect. The plaintiff's full name was, in the Spanish nomenclature, "Segundo Casteleiro y Colmenares". His surname in the English style should then have been, "Casteleiro".

Q. We are clear that when the application was made in Havana it was a head office decision whether it could go on the risk?

A. Yes.

Q. And that decision could not be made in Havana?

A. No.

While it is clear that all relevant circumstances surrounding the making of a contract are to be given due weight in determining the locality with which it is most closely associated, I am of opinion that in the present case the fact that both the applications and the policies were prepared in Ontario in a common, standard form which complied with the law of that Province, is to be regarded as of preponderating importance in determining the law governing the contracts.

I think it to be reasonable inference that a person applying for insurance on a form prepared at the head office of an Ontario company would anticipate that the policies which he was to receive would be governed by the law of that Province, and I think that the form of the policies which were issued in the present case evidences the fact that the insurer intended to be governed by that law.

For these reasons, as well as for those which have been so fully stated in the reasons for judgment of Mr. Justice MacKay, I am of opinion that the proper law of these contracts is the law of Ontario.

It would not be proper to leave this matter without making reference to the alternative argument advanced by Mr. Sedgwick on behalf of the respondent which was based on the case of *Varas v. Crown Life Insurance Company* (Superior Court of Pennsylvania, October term 1964) and which was accepted in Ontario and that treating this phase of the contract separately, it was to be regarded as governed by the law of that Province. It is true that the *Varas* case affords some authority for this proposition, but it appears to me that there is nothing in the circumstances of the present case to support the unprecedented proposition that the proper law of a continuing contract can shift from time to time. The proper law of these contracts is to be determined as of the date when they were made.

In view of all the above, I would dismiss this appeal with costs.

NOTES

1. There have been a great many cases dealing with problems similar to that in *Colmenares*. Many have involved life insurance companies that issued policies in Cuba before Castro came to power. Those who bought such policies were likely to be people who would not sympathise with the Castro regime, and who, therefore were often emigrés from Cuba. Such people would be understandably anxious to obtain any assets wherever they could be found. Actions were brought against life insurance companies not

only in Ontario (where many companies have their head offices), but in many American states. We shall look at the American solution to the problem later.

2. The issue in *Colmenares* was simple: which party should bear the risk of loss in the events that had occurred. Perhaps the insured, seeing the risk of revolution in the future, sought to protect himself and his family by having assets outside Cuba; perhaps the insurer thought that the risk of loss from something as remote as a communist revolution was not worth worrying about; perhaps both parties were simply caught by surprise. None of these facts change anything, except to the extent that they indicate how the risk of loss should be allocated. The choice of Ontario law as the proper law *does not* allocate that risk. Under Ontario law, the risk of foreign illegality making payment on a contract unlawful, is a risk inherent in any international contract and would be dealt with under the rubric of frustration or impossibility. (The English courts have had a long history of dealing with the consequences of exchange control laws.) In other words, we may respond to the conclusion that the contract is governed by Ontario law by saying, "So what, the question still is, who bears the risk of loss?" That question had to be answered whatever law was chosen. That question is the only question in the case and is not answerable by merely choosing a proper law. It is possible that the provisions of both Cuban law and Ontario law on the issue of frustration are the same. (We shall ignore the problems that might arise with this statement when Cuba was no longer a country with a market economy. It is safe to assume that for all societies that are based on markets there will have to be some law analogous to the common law concept of frustration.) After all, what is the common law rule regarding frustration? Is it anything more than the statement that the court will allocate the risk that has arisen between the parties. We shall not examine that law in detail here. Whatever its theoretical basis the effect of any decision in a case in which one party claims to be excused from performance by the occurrence of some event, the destruction of a music hall, royal appendicitis, or foreign nationalization orders, allocates the loss caused by that event to one or other of the parties, or in some rare case, where the loss may be shared, to both parties. We happen to believe that the risk of loss should have been borne by the insurer on the ground that it almost certainly did business in Cuba using its Canadian base as a way of encouraging Cubans to invest in it. This question was never examined by the court with the result that we have a judgment that does not deal with the only issue that had to be decided.

3. It is worth pointing out that Canadian life insurers were not unaware of the problems of doing business in Cuba. It became common for Canadian life insurers to provide that payment on their policies issued in Cuba could only be made in Havana. The effect of this provision was to prevent actions in Canada similar to that in *Imperial Life*. A similar case is *Arnoldson v. Confederation Life Insurance Association* (1973), 2 O.R. (2d) 484,

43 D.L.R. (3d) 324, reversed, (1974), 3 O.R. (2d) 721, 46 D.L.R. (3d) 641. (The case is not a satisfactory authority. The trial judge had allowed the plaintiff's motion for judgment on a specially endorsed writ, i.e., for summary judgment. This decision was reversed by the Court of Appeal which held that there should be a trial. There is no report of a trial judgment.) The effect of the Court of Appeal's judgment was to allow the insurer to raise as a defence in an action on a Cuban life insurance policy, the fact that the policy, issued in 1934, provided, "All payments . . . shall be made in the City of Havana, Republic of Cuba". If we assume, as is likely, that the action, had it gone to trial, would have been dismissed, the interesting contracts point raised is that the insurer was able to allocate the risk of loss from foreign exchange control legislation by such a simple device as a place of payments clause, when other clauses that do no more than allocate a risk of loss to one party which, were it not for the clause, would be on the other party, are routinely denounced as "exemption clauses" and restrictively interpreted. It is probable that Señor Arnoldson was no less surprised and disappointed by the court's interpretation of the policy than were any of the victims of exemption clauses before they were rescued by Lord Denning and the Supreme Court of Canada with the battle cries of "fundamental breach" and "*contra proferentem*" ringing across the court room.

4. Another equally curious aspect of the litigation is that, as we have already mentioned, there was (and is) a Canadian statute, the *Bretton Woods Agreement Act*, R.S.C. 1952, c. 19, s. 3. (now R.S.C. 1985, c. B-7, s. 5) which made the terms of the Bretton Woods Agreements part of the law of Canada. Article VIII(2)(b) of the Bretton Woods Agreement provided:

> Exchange contracts[9] which involve the currency of any member and which are contrary to the exchange control regulations of any member maintained or imposed consistently with this agreement shall be unenforceable in the territory of any member.

The Act provides:

> On and after the 27th day of December 1945, the first sentence of paragraph 2(b) of Article VIII of the Agreement . . . has the force of law in Canada.

When the litigation against Imperial Life was begun, Cuba was a member of the International Monetary Fund. Cuba left the IMF on April 2, 1964, two

---

9 There can be a dispute whether the contract in issue is an "exchange contract" or not. There are English cases on the point: see, e.g., *Sharif v. Azad*, [1967] 1 Q.B. 605; [1966] 3 All E.R. 785 (C.A.), *Wilson, Smithett & Cope, Ltd. v. Terruzzi*, [1976] Q.B. 683, [1976] 1 All E.R. 817, and *United City Merchants (Investments) Ltd. v. Royal Bank of Canada*, [1983] A.C., 168, [1982] 2 All E.R. 720, [1982] 2 W.L.R. 1039 (H.L.). It is not relevant to the argument in this paper whether the life insurance policies in *Imperial Life* were or were not "exchange contracts".

and a half years after the plaintiff had made a formal claim for the cash surrender value of the policies, but before the judgment of the trial judge. No reference to the *Bretton Woods Agreement Act* was made by any Canadian court. The act would suggest that the result in *Imperial Life* should have been different, but if so, it would be as a result of the application of the law of Canada which, in this situation, allocates the risk of loss to the party who would seek to avoid the exchange control laws of another member of the IMF.

5. It may have been, of course, that the Act was not relevant since, at the date of the trial, Cuba was no longer a member of the IMF. It might have been expected that there would have been a reference to the legislation: it could not have made the insurer's position worse. There were a large number of similar American cases and, while the pattern is not entirely consistent, the courts tended to side with the insurer while Cuba remained in the IMF, and with the insured afterwards. Many of the United States defendants were Canadian life insurance companies. The judgment of the Supreme Court mentions one American case, *Varas v. Crown Life Insurance Co.* (1964), 203 A. 2d 505, (Superior Court of Pennsylvania) in which explicit reference was made to the American equivalent of the *Bretton Woods Agreement Act*. *Varas v. Crown Life* makes the risk allocation inherent in the decision more obvious than does the Supreme Court, but the Supreme Court only refers to the case in the context of a curious contracts argument, *viz.*, that the contract to pay the cash surrender value was a contract separate from the policy and, under the normal rules of offer and acceptance, since that contract was made in Ontario, Ontario law applied.

6. British Columbia's *Insurance Act*, R.S.B.C. 1979, c. 200, s. 7 reads: "A contract insuring a person domiciled or resident in the Province at the date of it, or the subject matter of which is property or any interest in property situated in the Province, shall be deemed to be made in the Province and shall be construed accordingly." Given what *Colmenares* says about the significance of the place of contract does this provision mean that all insurance contracts for B.C. residents are governed by the law of that province? What if the parties should stipulate for another province's law? What if the policy should contain a clause like that found in *Arnoldson*?

Ralli Brothers v. Compania Naviera Sota y Aznar
[1920] K.B. 287
(C.A., Lord Sterndale, M.R., Warrington & Scrutton, L.JJ.)

[An English firm, carrying on business in London, chartered a ship to carry a cargo of jute from India to Spain. The charterparty set out the freight payable and provided for arbitration in London in the event of a dispute. The charterparty provided that half of the freight was to be payable in Barcelona. After the charterparty was made but before any amount of the freight became payable in Barcelona, the Spanish government established

NOTES

1. The special position of the Supreme Court of Canada in conflicts cases has never been fully explored. Consider the problem *McLean v. Pettigrew* as simply one of determining the correct interpretation of the Ontario *Highway Traffic Act*. The only issue before the Supreme Court is whether the Ontario guest passenger legislation applies to prevent *this* plaintiff from suing *this* defendant. Ontario law is, before the Supreme Court, not a fact as "found" by the trial judge, but a matter of law, which the Supreme Court can authoritatively interpret.

2. As we have noted, in an action in an Ontario court the laws of any province other than Ontario have to be established by expert evidence. The Supreme Court may, however, take judicial notice of the laws of all provinces. In *Logan v. Lee* (1907), 39 S.C.R. 311, counsel for the defendant in argument before the Supreme Court relied on the proof of the law of New Brunswick in an action brought in Québec. Sir Charles Fitzpatrick, C.J.C. interrupted counsel and said: (p. 313)

> I think it proper that I should here announce, after having consulted my brother judges, that this court, constituted as an appellate tribunal for the whole Dominion of Canada, requires no evidence as to what laws may be in force in any of the provinces or territories of Canada. This court is bound to . . . take judicial notice of the statutory or other laws prevailing in every province and territory of Canada, *sua motu*, even in cases where such laws may not have been proved in evidence in the courts below, and although it might happen that the views as to what the law might be, as entertained by the members of this court, might be [sic] in absolute contradiction of any evidence upon those points adduced in the courts below.

Logan v. Lee followed the decision of the House of Lords in *Cooper v. Cooper* (1883), 13 App. Cas. 88. This simple approach does not remove all problems but, on the facts of *McLean v. Pettigrew*, it might have permitted a solution based on an interpretation of the Ontario legislation that excluded its application to Québec defendants. Such a solution would obviously exclude any possibility of forum-shopping.

3. As the law now stands, it is, under *Phillips v. Eyre*, theoretically possible for an Ontario court to hold that, regardless of any foreign facts, the Ontario legislation (in the terms in which it was drafted in 1945) bars *all* actions in Ontario. This result vividly illustrates the extraordinary difference between the tort rules and the contract rules.

4. Taschereau J. states that "there is no ambiguity in the wording of the [Ontario] Act". This may be so in some odd linguistic sense, but does the statement correctly express the function of a court in interpreting the words of an act of the legislature? Is the question of the purpose of legislation nothing more that a question of resolving any ambiguity? This

issue is an example of the problem of determining what the "law" of a province is. Is it that law considered as some abstract body of rules, divorced from any social context or is it the law in all its complexity: a striving to achieve some kind of acceptable order, predictability, fairness and justice? This issue cuts to the heart of what conflicts is all about. We shall return to it frequently.

5. Courts have never accepted the full consequences of *Phillips v. Eyre* when to do so would very seriously undermine important values. This fact has been particularly well demonstrated in a couple of early decision of the Privy Council on appeal from Canadian courts, though these cases tend not to be referred to often by Canadian judges today.

6. In *Walpole v. Canadian Northern Railway*, [1923] A.C. 113, 70 D.L.R. 201 (P.C.), the plaintiff's husband had been killed in British Columbia by the negligence of his employer, the defendant. British Columbia had workers' compensation legislation which prohibited any action by the injured worker or his dependents. The plaintiff sued in Saskatchewan where there was no such restriction. The Privy Council dismissed the claim on the grounds that the husband's contract of employment incorporated the provisions of the *Workmen's Compensation Act*, and that, applying *Phillips v. Eyre*, the act of the defendant being neither actionable nor punishable in British Columbia, could not be anything but "justifiable". A broad definition of "non-justifiability" would clearly support the plaintiff's claim. What, after all, could be more explicit than the provisions of the Ontario act so easily circumvented in *McLean v. Pettigrew*?

7. *McMillan v. Canadian Northern Railway*, [1923] A.C. 120, 70 D.L.R. 229 (P.C.) was again an action by an injured worker against his employer. The worker had been injured in Ontario (where no cause of action lay by virtue of the *Workmen's Compensation Act*), and he also sued his employer in Saskatchewan. The only difference between the Acts of Ontario and British Columbia lay in the fact that in the former province, a claim for compensation under the Act was to be made against the employer, while in the latter province the claim lay against the Board. The Privy Council in this case adopted the reasoning of the Saskatchewan Court of Appeal which had relied on the "fellow servant rule" to hold that nothing the *employer* did was not "justifiable" in Ontario. This case is equally hard to reconcile with *McLean v. Pettigrew*.

8. How do any of these cases fit with *Chaplin v. Boys*?

9. See also: *Canadian Pacific Railway Co. v. Parent*, [1917] A.C. 195 (P.C.). A more recent example is *Sayers v. International Drilling*

Co. N.V., [1971] 1 W.L.R. 1176, [1971] 3 All E.R. 163 (C.A.)—another decision in which Lord Denning meant well!

O'Connor v. Wray
[1930] S.C.R. 231, [1930] 2 D.L.R. 899
(Anglin, C.J.C., Rinfret, Newcombe, Smith and Lamont, JJ.)

NEWCOMBE J.—The wife of the plaintiff, Walter O'Connor, and Mrs. Gertrude Boyd, the plaintiff of that name, were on Sunday afternoon, 11th July, 1926, walking together on the Montreal Road, in the province of Ontario, when they were both struck by an overtaking automobile, belonging to the defendant, and negligently driven by Ronald Cochrane. Mrs. O'Connor was instantly killed and Mrs. Boyd suffered painful and permanent injuries.

The defendant lives and carries on business at Montreal, in the province of Québec; and; at the time of the accident, Cochrane, was and has been for about three years, in the defendant's employ in the capacity of manager. I extract the following from the defendant's evidence:

> Q. As your manager, what kind of work was he called upon to perform?
>
> A. Well, he had complete authority over everything and had all my interest to look after. When I was not there myself he acted just the same as I would myself if I was not there during my business time.

Cochrane had been granted a few holidays, and the use of one of the defendant's automobiles, in order to visit his mother who lived at Arnprior, in the Province of Ontario; and, when the accident occurred, he was on his way thither, driving the car, and accompanied by his wife and one Tedley, an employee in the defendant's establishment, who had been permitted also to have leave of absence for the occasion. Both Cochrane and Tedley were qualified and experienced chauffeurs, though neither one of them, it appears, was employed exclusively in that capacity.

The actions were brought in the province of Québec, not against Cochrane, who was at the time in charge of and driving the car, but against the defendant as the owner, though not in possession, who was alleged to be responsible for the damages by the law of Ontario.

It was established by the proof, and found at the trial and upon appeal, that the defendant was not guilty of any negligence. The evidence in support of that seems to be perfectly clear, and the findings cannot, I think, be brought successfully into question. But the plaintiffs rely upon the *Highway Traffic Act*, 1923, of Ontario, chapter 48, and especially sections 42 and 43, which make the following provisions:

> 42(1) The owner of a motor vehicle shall be responsible for any violation of this Act or of any regulation prescribed by the Lieutenant-Governor in Council, unless at the time of such violation the motor vehicle was in the possession

responsible for loss or damage sustained by any person by reason of his motor vehicle. This seems to be clearly the intention of the Legislature, having regard to the text and the history of the legislation. The respondent points out that formerly, by section XXI, article 1406, of the Revision of 1909, it was enacted, among the clauses regulating motor vehicles, that:

> The owner of a motor vehicle for which a certificate is issued under this section, shall be held responsible for any violation thereof or of any regulation provided thereunder by order of the Lieutenant-Governor in Council; *and shall be responsible for all accidents or damages caused by his motor vehicle upon a highway or public square*.

The last clause, which I have underlined above, disappeared when the article was replaced by the amending Act, chapter 19, of 1912. And, by the article as formerly enacted, it is clear that the liability which is imposed to compensate for accidents or damages, as distinguished from that incurred for any violation of the statute or regulations, was founded upon the concluding sentence, which was repealed by the Act of 1912, and not upon the earlier provision of the article which still remains. Of these two clauses comprised in this article, the first did not expressly, or with any degree or certainty, declare liability for damages; the second did. The latter was therefore the effective provision for the purpose which it expressed, and this seems to result from the proper appreciation of the maxim *expressio unius est exclusio alterius*, or *expressum facit cessare tacitum*. And so, the charging clause having been repealed, there remains no provision upon which to base a reasonable pretention that the owner is bound to compensate when he has committed no fault; and, if any possible question could otherwise have been raised about it, that is concluded by the implication of subsection 2 of article 53, which establishes the materiality of negligence or improper conduct by the owner.

For these reasons I would dismiss the appeal with costs.

[Rinfret agreed with Newcombe J. Smith J., with whom Lamont J. concurred, wrote a short opinion also agreeing with Newcombe J. Anglin J. dissented on the ground that Québec law was not as the majority saw it to be.]

NOTES

1. Notice how the decision of the Supreme Court in *O'Connor v. Wray* could be supported simply on the basis that the Ontario legislation did not apply: as such it would be a solution based on what we suggested could have been the basis for a decision in *McLean v. Pettigrew*. That is, the court could simply have decided that, in the circumstances of this case, it was not the purpose of the Ontario statute to apply to owners of vehicles who were Québec residents.

2. The more important aspect of the case appears if we assume that, disregarding for the moment the foreign facts, the Ontario legislation

would operate to make the defendant owner liable. The current provisions are: *Highway Traffic Act*, R.S.O. 1990, c. H.8, s. 192(1)

> The owner of a motor vehicle . . . is liable for loss or damage sustained by any person by reason of negligence in the operation of the motor vehicle . . . on a highway unless the motor vehicle . . . was without the owner's consent in the possession of some person other than the owner or his chauffeur, and the driver of a motor vehicle . . . not being the owner is liable to the same extent as the owner.

3. The issue then becomes one of considering what Newcombe J. meant, or should be taken to mean, when he said that he was "not satisfied that the defendant ever became subject to the *Highway Traffic Act* of Ontario". It is this aspect of the case that we will focus on later. The case is, from this point of view, a paradigm or archetype of a very important class of cases. The special feature of the case is that, as a case of vicarious liability, it presents the classic problem of determining which of two innocent people shall suffer for the misdeeds of a third. This problem is difficult enough when the facts are not geographically complex: it becomes very much more difficult when there are geographically complex facts.

4. Consider the position of the Supreme Court if the argument that the first rule in *Phillips v. Eyre* is a rule reflecting only the public policy of the forum, i.e. that the foreign law is so offensive that the court will not give effect to it. Is such a response to the law of another province permissible in a court of one province? Is such a response permissible in proceedings before the Supreme Court?

In recent years there have been signs of a shift in the application of *Phillips v. Eyre* in Canadian (or at least Ontario) courts. This shift appears to have been prompted by the enactment by Québec of the *Automobile Insurance Act*, R.S.Q. 1977, c. A-25, which came into force on March 1, 1978. The effect of this legislation was to set up a tax-funded body to compensate persons injured in automobile accidents regardless of fault. Compensation would be paid according to a set scale, which provided for payments which were lower than would normally be awarded by a court which had found delictual responsibility under the old regime. The statute also eliminated all causes of action in respect of bodily injury caused by an automobile. The drafters of the statute made some attempt to anticipate problems which would arise from territorially complex cases. The statute provided that victims of accidents which occurred in Québec who were not Québec residents would be compensated to the extent they were not responsible for the accident. In other words, non-residents lost the right to sue in delict but were still subject

> even if the respondent plaintiffs attended the trial in person, delay and expense in going to England from Illinois as compared with going from there to Ontario is not the consideration which it might have been at an earlier day, and indeed all the disadvantages of the situation would rest with the applicant and the Court of a forum which I find to be *non conveniens*.
>
> At the conclusion of the argument, I indicated that if I allowed the application, I would stay rather than dismiss the action. But since there is no question of the merits of the case being here involved and in accordance with the evident tenor of the authorities that I have examined, and since all possible parties are before me, the proper disposition under the circumstances of this case is the action should be dismissed with costs.
>
> An order will go to this effect and the applicant will also have its costs of the motion.
>
> Action dismissed.

NOTES

1. Notice that the defendant, as a multi-national insurer, could be personally served in a very large number of jurisdictions in the world. The *Insurance Act*, R.S.O. 1990, c. I.8, s. 54, illustrates the kind of legislative provision that makes service easy.

2. The restrictive test applied in *Moreno v. Norwich Union* has been relaxed in more recent English cases which have applied a "balance of convenience" test as between plaintiff and defendant. In *The Atlantic Star* a collision occurred in Belgian waters between a Dutch ship, the "Atlantic Star" and Dutch and Belgian barges. Proceedings were begun in Belgium that were likely to end favourably to the defendants. The plaintiffs, the barge owners, brought an action in England. The defendants argued that it was not convenient to bring the action in England. Lord Denning, M.R., in the Court of Appeal, upholding the decision of the trial judge, said; ([1973] Q.B. 364, 381-82, [1972] 3 All E.R. 705, 790)

> No one who comes to these courts asking for justice should come in vain. . . This right to come here is not confined to Englishmen. It extends to any friendly foreigner. He can seek the aid of our courts if he desires to do so. You may call this "forum-shopping" if you please, but the forum is England, it is a good place to shop in, both for the quality of the goods and the speed of service.

The House of Lords reversed the Court of Appeal and stayed the action. Lord Reid in his judgment said ([1974] A.C. 436, 453, [1973] 2 All E.R. 175, 181) that the statement by Lord Denning, quoted above, recalled, "the good

old days, the passing of which many may regret, when inhabitants of this island felt an innate superiority over those unfortunate enough to belong to other races". Lord Reid was a Scottish judge. (See also, Williams, "The English are Best" (1977), 8 *V.U.W.L.* Rev. 358.)

The law stated in *The Atlantic Star* was developed in *MacShannon v. Rockware Glass Ltd.*, [1978] A.C. 795, [1978] 1 All E.R. 625, (H.L.) and further in:

Spiliada Maritime Corp. v. Cansulex Ltd.
[1986] 3 W.L.R. 972, [1986] 3 All E.R. 843, (H.L.)
(Lords Keith, Templeman, Griffiths, Mackay and Goff)

[Damage to two ships occurred when wet sulphur was loaded into the ships in British Columbia. An action was brought by one shipowner in England for damages for the loss arising from the action of the sulphur in causing severe corrosion to the ship. The ship, the "Spiliada" was Liberian. It was owned by a Liberian corporation, managed partly in Greece and partly in England. The insurers were English. The owners of the second ship, the "Cambridgeshire" who were insured by the same insurer, commenced an action in England using the same lawyers as the owners of the "Spiliada".

[The plaintiffs obtained leave to serve the defendant, the sulphur exporter, *ex juris*. The defendant argued that the service should be set aside. The trial judge refused; the owners appealed to the Court of Appeal. Before the Court of Appeal, the plaintiffs maintained that since the action was statute-barred in British Columbia, the plaintiffs would be deprived of a legitimate juridical advantage by being forced to sue in B.C. The Court of Appeal allowed the defendant's appeal, holding that neither the expenses so far incurred in the English proceedings nor the existence of the limitation period in B.C. were sufficient reasons for continuing the action in England. Reliance was placed on the *Amin Rasheed* case in holding that, as a matter of the court's discretion, the leave to serve *ex juris* should be set aside. The owners appealed to the House of Lords.]

LORD GOFF, after stating the facts and examining the decision of the trial judge and the Court of Appeal, continued:

(4) Submissions of Counsel

Before your Lordships, the shipowners submitted that the Court of Appeal, having accepted that the judge applied the correct test, went beyond its limited power of review of the exercise of the judge's discretion. The real reason for its intervention was that it disagreed with the weight attached by the judge to the Cambridgeshire factor and was then, it was submitted, over-astute to discover an error which would enable it to substitute its own discretion for his. For Cansulex, on the other hand, it was submitted that the Court of Appeal was fully entitled to interfere with the judge's exercise of his discretion, substantially for the reasons given by it but it was further submitted that, in any event, both the judge and the Court of Appeal should have applied the more stringent test set out in the passage from Lord Diplock's speech in the *Amin Rasheed* case [1984], A.C. 50 at 68,

So it is necessary to consider whether justice required the imposition of such a term. The evidence before the Court of Appeal showed that neither the shipowners nor their legal advisers were aware of the two-year limitation period applicable in British Columbia. Cansulex did not draw the matter to their attention in their affidavit evidence the shipowners' solicitors simply stumbled on it when investigating the availability of suitable lawyers in Vancouver. Next, although Cansulex had applied to the English court to set aside the proceedings in the "Cambridgeshire" action, they had not appealed from the judge's adverse decision on the point and the "Cambridgeshire" action had proceeded to trial. Furthermore, had the shipowner's solicitors considered the matter, experience would have indicated that, having regard to the law as generally understood to prevail before the decision of this House in the *Amin Rasheed* case [1983] 2 All E.R. 884, [1984] A.C. 50, in which the speeches were delivered in July 1983, and to the prominence hitherto given to legitimate personal and juridical advantages in the English jurisdiction (see, in particular, the decisions of the Court of Appeal in *Britannia Steamship Insurance Association Ltd v. Ausonia Assicurazioni SpA*, [1984] 2 Lloyd's Rep 98 and the *Ilyssia* case, [1985] 1 Lloyd's Rep 107), it was improbable that any different conclusion would be reached on an application to set aside the leave granted in the present case. In this connection, it is to be observed that the shipowners' cause of action against Cansulex in the present case must have accrued in November 1980 (when the loading of the cargo on board the "Spiliada" in Vancouver was completed) and so was prima facie time-barred in British Columbia by November 1982, nine months before the decision of this House in the *Amin Rasheed* case. In my judgment, had the point arisen, I would have been minded to hold that, in all the circumstances of the case, the shipowners had acted reasonably in commencing proceedings in this country, and that they had not acted unreasonably in failing to commence proceedings in British Columbia before the expiry of the limitation period there. In these circumstances, had I agreed with the Court of Appeal that the judge erred in the exercise of his discretion, I would nevertheless only have set aside the proceedings, to enable proceedings to be brought in British Columbia, on the condition that Cansulex should waive its right to rely on the time-bar in British Columbia.

However, for the reasons I have given I would allow the appeal with costs here and below, and restore the order of Staughton J.

[Lord Keith agreed with Lord Goff. Lord Templeman gave a short judgment also agreeing with Lord Goff. Lords Griffiths and MacKay agreed with Lords Templeman and Goff.]

NOTES

1. The *Atlantic Star* has been applied in some Canadian cases. In *Vancouver Island Helicopters Ltd. v. Robertshaw Controls Ltd.* (1980), 30 O.R. (2d) 283; 116 D.L.R. (3d) 716 (High Ct., leave to appeal to Divisional Court refused, Nov. 18, 1980), the Court used Lord Wilberforce's test of balancing the interests of plaintiff and defendant; in *Kuhr v. The Ship "Friedrich Busse"* [1982] 2 F.C. 709, 134 D.L.R. (3d) 261 (T.D.), the court said that *forum non*

conveniens should not be used to prevent the court from taking jurisdiction over such an elusive asset as a ship, when the ship was arrested in the jurisdiction. When a ship is arrested, the action is a proceeding against the ship itself, i.e., it is a proceeding *in rem* and the jurisdiction of the court does not depend on service on the defendant, but on the power to arrest the ship in Canadian waters.

2. In *Rogers v. Bank of Montreal*, [1984] 2 W.W.R. 597, 49 B.C.L.R. 85, 4 D.L.R. (4th) 507, (leave to appeal to S.C.C. refused [1984] 1 S.C.R. v) the British Columbia Court of Appeal made a very complete survey of the cases on the issue of forum conveniens. In that case the majority of the court refused to grant a stay, applying the strict test of *Moreno v. Norwich Union*, and holding that a stay would only be granted if the plaintiff's choice would be vexatious or an abuse of the process of the court. Carrothers J.A. dissented on the ground that the rules applicable between provinces should not be that same as those between international states.

3. The justification for choice of law rules is often put on the basis that "forum-shopping" has to be or should be discouraged. Consider the relation between that justification or purpose for choice of law rules and the rules governing the taking of jurisdiction. If, for example, it is relevant that the plaintiff has, by suing in a particular jurisdiction, a "legitimate personal or juridical advantage" and that the defendant has to show that the plaintiff should not be entitled to keep this advantage, we have not done much to discourage forum-shopping, have we? Perhaps we have only encouraged "legitimate forum-shopping", but if so, what distinguishes the permissible kind from the impermissible kind? If we are ambivalent about forum-shopping, what should be the correct approach to it? Inconsistencies like this often indicate that underlying theory is inadequate. We shall have to consider if criteria can be developed that would permit issues of choice of law and issues of jurisdiction to focus on the same concerns.

4. Lord Goff refers (*supra*, page 251) to United States and Canadian approaches to the issue of *forum non conveniens*. He mentions that a federal system may affect those courts approaches. Keep constantly in mind the need to consider the applicability in Canada of approaches to inter-jurisdictional issues of all kinds developed in a country like England.

5. One of the most important issues in conflicts (and one that is largely neglected in traditional Anglo-Canadian writing on the topic) is the existence of special problems arising from the fact that Canada is a federation. Very few, if any, conflicts issues are the same if we compare their resolutions in the context of a federal system and outside such a context. The recent case of *De Savoye v. Morguard Investments Ltd.*, [1990] 3 S.C.R. 1077, [1991] 2 W.W.R. 217, 76 D.L.R. (4th) 256, (*infra* page 348) picking up and

developing a judgment of the Supreme Court, *Moran v. Pyle National (Canada) Ltd.*, [1975] 1 S.C.R. 393, [1974] 2 W.W.R. 586, 43 D.L.R. (3d) 239, reversing, [1972] 5 W.W.R. 456 (Sask. C.A.), which reversed, [1972] 3 W.W.R. 161, (*infra*, page 269) may now become the basis upon which Canada will build a Canadian law of both jurisdiction and the recognition and enforcement of foreign judgments that will reflect Canada's constitutional values—perhaps now to be seen as part of the various proposals for a closer economic union between the provinces[3]—and not those of the United States or the peculiar view of the English.

2. Contractual Limits on Forum Selection

It is common in many international contracts for the parties to specify both a law to "govern the contract" and a place where any disputes may be litigated or arbitrated. The effect of such clauses has generated a large and complex body of rules. We will only briefly explore the issues in these materials and here we are only concerned with a clause dealing with the place where any disputes may be litigated. There are two kinds of clauses. The first is one where the parties agree to submit their disputes to the courts of a particular jurisdiction but without specifying that that court shall have exclusive jurisdiction. The second is where exclusive jurisdiction is conferred on a specified court.

Clauses dealing with the place where an action may, or must be brought are common. Check, for example, any standard contract for computer software and the chances are very good that you will find that an action can only be brought in the courts of California, or wherever the vendor is. A choice of jurisdiction clause or an attornment clause may be exclusive or non-exclusive. A non-exclusive choice of the Ontario courts makes them competent (subject always to the courts' discretion to protect its process and to prevent abuse) to hear the case and makes any judgment that they may give enforceable against the defendant in most countries of the world.

Courts are sometimes concerned about the enforcement of an exclusive clause: a clause providing that only one court shall hear any dispute. If such a clause is used, it will be no better than the contract that contains it. If the contract is unfair or unconscionable the choice of jurisdiction clause may fall with any other clause. Conversely, if the contract is not unfair, it is hard to see what grounds there might be for refusing to give it effect. In *E.K. Motors Ltd. v. Volkswagen Canada Ltd.*, [1973] 1 W.W.R. 466, the Saskatchewan Court of Appeal enforced a clause in an agreement between a Saskatchewan

---

3 This sentence was originally written in January 1992. As we revise the materials in July 1992, we do not know what to say, so we have left what we said as, perhaps, no more that a statement of what we had hoped might have come to pass.

> the undesirability of piling up suits in congested centres, the burden of jury duty on people of a community having no relation to the litigation, the local interest in having localized controversies decided at home and the unnecessary injection of problems in conflict of laws. In general the doctrine of *forum conveniens* seldom justifies refusing jurisdiction based on the residence of the plaintiff or the defendant.
>
> The court will not exercise jurisdiction if it is a seriously inappropriate forum for the trial of the action so long as an appropriate forum is available to the plaintiff or if he has an adequate remedy abroad. In exercising its discretion the court will also weigh the relative advantages and obstacles to a fair trial. Will the plaintiff be prejudiced by having to sue in the foreign country? The substance of the plaintiff's action must also be considered. To what extent is it connected with the forum? Under the doctrine of *forum conveniens*, the court's assumption of jurisdiction must always be clearly justified. In other words, the plaintiff's choice of jurisdiction must not be oppressive or vexatious, or an abuse of process.

It must also be remembered that the decision of Judge Hall was made in the exercise of his discretion and should not be interfered with unless it is shown that he erred in the exercise of such discretion by acting on some wrong principle of law or if other grounds establish that the manner in which he exercised his discretion would result in some injustice being done. In my opinion, no such error or grounds have been established by the appellant.

In the result I would grant leave to appeal but would dismiss the appeal with costs.

NOTES

1. *Robinson v. Warren* was ultimately settled before trial on terms favourable to the plaintiff.

2. For more recent examples of the same type, see *Ichi Canada Ltd. v. Yamauchi Rubber Industry Co.* (1983), 43 B.C.L.R. 215, 144 D.L.R. (3d) 533 (B.C.C.A.), affirming (1982), 36 B.C.L.R. 100, 134 D.L.R. (3d) 396, and *Pindling v. NBC* (1984), 49 O.R. (2d) 58, 14 D.L.R. (4th) 391, (H.C.) In the latter case the Prime Minister of the Bahamas brought an action against NBC for defamation published in a broadcast originating in the United States, the trial judge refused to set aside the service *ex juris*.

3. The issue of jurisdiction raised in *Robinson v. Warren* had a direct impact on the choice of law rule applicable on the merits for, under

Phillips v. Eyre, the choice of forum by the plaintiff determines for all practical purposes the choice of law issue in the case.

4. In *Charlottetown Metal Products Ltd. v. Miles Refrigeration Co. Ltd.* (1980), 30 Nfld. & P.E.I.R. 190, 115 D.L.R. (3d) 63, aff'd, *sub nom.*, *Charlottetown Metal Products Ltd. v. Lucas-California Co.* (1982), 36 Nfld. & P.E.I.R. 115, 134 D.L.R. (3d) 438 (P.E.I. C.A.), another case under the very broad rules of Prince Edward Island, the court considered the appropriate test to determine the extent of the plaintiff's power. MacDonald J. said: (115 D.L.R. (3d) 63, 71,72)

> In the present case there will be an inconvenience to the parties no matter where the case is tried. While the defendant does not have a place of business or agent in Prince Edward Island and did not have any previous contact with this Province prior to the present transaction, the "centre of gravity" was Prince Edward Island. The Defendant's agent came to Prince Edward Island to work out the details of its proposed contract with the plaintiff, the various components of the freezing equipment were to be either fabricated in Prince Edward Island or shipped here for assembly. Equipment which did not come to Prince Edward Island was shipped direct from England and Japan to Cuba on the instructions of the defendant. There is much more connection with Prince Edward Island than the State of Washington.
>
> I am of the opinion that the *forum conveniens* is in the Province of Prince Edward Island. The plaintiff carries on business in Prince Edward Island; the contract is alleged to have been made here as is the breach; the tort by the defendant is alleged to have occurred in this Province; the ease of having witnesses attend in either the State of Washington or Prince Edward Island is not in issue; the availability of Paul Miles as a witness in the State of Washington has not been shown. Considering the total case, the centre of gravity of the plaintiff's action lies in this Province and it would be just that the trial be held in Prince Edward Island.
>
> . . .
>
> In looking to the substance in the present case it will be a determination of whether there was a contract between the parties and a tort committed by the defendant. The factors from which it will be necessary to determine the answer to these problems are in a large part alleged to be central to Prince Edward Island.
>
> There is one final factor which, in my opinion, does not justify the defendant's application that Prince Edward Island be not used as the forum. Throughout the course of the hearing the defendant contended that the State of Washington was the appropriate forum. At the conclusion of the defendant's counsel's submission he indicated that he was not prepared to say that the defendant would not challenge the plaintiff's action on the ground of lack of jurisdiction either in Nova Scotia or the State of Washington. The defendant stated that it should not be prejudiced by having to indicate a forum where it would not contest the plaintiff's jurisdiction. In my opinion a defendant who contests the plaintiff's choice of forum must indicate a forum which it believes to be the proper one. It would be vexatious and would not be in the interest of justice

> conditional appearance and an application to set aside an order for service out of the jurisdiction and that application then fails, the entry of that conditional appearance (which then becomes unconditional) is a voluntary submission to the jurisdiction of the foreign court. The defendant need not appear there, conditionally or unconditionally. He can stay away. But as the cases say, he may prefer to take his chance upon a decision in his favour. If he does so, he must also accept the consequences of a decision against him.
>
> We appreciate that on this view the dividing line between what is and what is not a voluntary submission and what is and what is not an appearance solely to protest against the jurisdiction is narrow and may often be difficult to draw satisfactorily. But, as we think, it must depend in each case upon what it was that the defendant did or refrained from doing in relation to the jurisdiction of the foreign court.

NOTES

1. *Henry v. Geoprosco* was considered by the British Columbia Court of Appeal in *First National Bank of Houston v. Houston E & C Inc.*, [1990] 5 W.W.R. 719. The court noted (at 725) that

> a litigant can by the acts he does or which are done on his behalf attorn although he has no intention of doing so as was indeed the case in the *Henry* decision. He is nonetheless attorning even if he has been given erroneous legal advice as to what constitutes a submission or what the result will be of the act which he does.

2. In *Re McCain Foods Ltd.* (1979), 26 O.R. (2d) 758, 769; 103 D.L.R. (3d) 734 (C.A.) it was said (by Blair J.A.):

> In dismissing this appeal we are not to be taken as approving the view of Cromarty J. that the [defendants] by entering a conditional appearance and applying to set aside the writ voluntarily attorned to the jurisdiction of the New Brunswick Court and, consequently, were bound by that court's decision. This view was founded upon *Harris v. Taylor*, [1915] 2 K.B. 580, and *Henry v. Geoprosco Int'l Ltd.*, [1976] Q.B. 726, which decisions have attracted considerable criticism. There is no need to consider these authorities for the purposes of our decision in the case. We do not consider ourselves bound by them and we reserve our view on them for another day.

The effect is that counsel for a defendant served *ex juris* may find it easier to tread the narrow line between submission and an appearance solely to dispute the jurisdiction of the foreign court. But while the line here may be wider than in England, it is, nevertheless, a narrow one and counsel has to be very clearly aware of the limits he or she must respect. Any invitation to the court to discuss the merits of the case will be foolish.

3. In *Clinton v. Ford* (1982), 37 O.R. (2d) 448, 137 D.L.R. (3d) 281 (C.A.) the issue concerned the enforceability of a South African judgment.

In 1976 the parties were both resident in South Africa. The defendant (a solicitor) agreed to buy a car from the plaintiff. The defendant repudiated the contract, and in 1977 he moved to Ontario. In 1978 the plaintiff started proceedings in South Africa and obtained an interim order for the seizure of land in South Africa owned by the defendant. The defendant delivered the equivalent of a Statement of Defence and defended the action on the merits, but took no further part in the proceedings. The plaintiff sought enforcement of the judgment in Ontario.

Houlden J.A. giving the judgment of the Court, referred to *Henry v. Geoprosco*, to *Dicey & Morris* (10th Ed. 1980 vol. 2, pp. 10-50) and the question asked by the editors regarding that case: "How far does this represent the common law rule?", and quotes their answer: (p. 451 O.R., p. 285 D.L.R.))

> First, it is clear that an appearance is not involuntary at common law merely because it is motivated by the fact that the defendant has property within the jurisdiction of the foreign court on which execution may be levied in the event of judgment going against him by default; still less is an appearance involuntary when it is made because, although the defendant has no property within the jurisdiction of the foreign court, his business often takes him there, so that the judgment might be made effective against him. Secondly, an appearance is not involuntary when it is made after execution has been levied under the judgment in order to rescue the property which is the subject-matter of the execution. Thirdly, *if property is seized and the defendant appears and defends the case on the merits, the appearance is not involuntary.* But there are weighty dicta to the effect that an appearance merely in order to save property arrested or attached as a basis of the jurisdiction of the foreign court will not be regarded as voluntary at common law. Thus there may be cases in which the defendant may appear to oppose the seizure on jurisdictional grounds; e.g., where he denies he has property within the jurisdiction or where he challenges the validity of the seizure. In such cases, at any rate, the appearance should not be regarded as voluntary. (Emphasis mine.)

Houlden J.A. continued:

> In the present case, the defendant could have elected to ignore the proceedings in South Africa. If he had done so, the South African judgment would clearly not have been enforceable against him. However, if he had followed this course of action, he would have lost his property in South Africa even though there might have been no basis for jurisdiction of the South African court, or even though the seizure of his property was invalid. In my opinion, the defendant should have had the right to appear in the South African action for the purpose of (a) contesting the validity of the seizure of his property, or (b) contesting the jurisdiction of the South African court, without attorning to the jurisdiction of the South African court: see *The Duplis*, [1912] P. 8; *Henry v. Geoprosco International Ltd.* at pp. 747-48; *Cheshire and North on Private International Law*, 10th ed. (1979), at p. 640; Beale, *A Treatise on the Conflict of Laws* (1935), vol. 1, para. 82.6, pp. 352-53.

There is no proof before us that it is possible in South Africa to enter a conditional or limited appearance. However, even if this is not possible under South African procedure, the defendant in his defence to the application for summary judgment or in his plea could have limited his defence to the two matters that I have mentioned. Instead, he chose to defend the action on the merits. Having done so, I think that his appearance was a voluntary one, notwithstanding the seizure of his property prior to the issue of the edictal citation. He is, therefore, bound by the South African judgment: see Read, *Recognition and Enforcement of Foreign Judgments* (1938), p. 161.

The following case deals with what is a comparatively uncommon situation, *viz.*, the use of a foreign judgment as a defence to an action brought in another jurisdiction. In theory, the rules are the same for both plaintiff and defendant: the judgment of a foreign court will be recognized when the foreign court had jurisdiction in accordance with the rules of the recognizing court. In practice, the rules must operate differently. In commercial cases the issue of recognition, as the sole focus of the inquiry, arises only in cases where one party has obtained a foreign judgment and the other now wants to re-litigate the dispute over again. The issue here is one of issue estoppel, since the foreign judgment cannot, for technical reasons, be regarded as *res judicata*.

When the foreign court (or any court, for that matter) dismisses a plaintiff's claim, it may have done so on any one of a number of defences raised by the defendant: that the action was brought out of time; that another court is a more appropriate forum or the contractually chosen forum; that the pleadings are defective; that the judge believed the witnesses for the defence rather than those of the plaintiff; that no damages were suffered by the plaintiff; etc. When judgment has gone for the plaintiff, on the other hand, it must have been on the basis that *all* the arguments of the defendant have been dismissed. A judgment in favour of the defendant on one of the grounds raised by that party, still leaves it open to the plaintiff to try another attack on another basis. It is this fact—all too often ignored by those who discuss the topic—that creates, in part, the differences between recognition and enforcement.

Black-Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg A.G.
[1975] A.C. 591; [1975] 1 All E.R. 810, (H.L.)
(Lords Reid, Dilhorne, Wilberforce, Diplock & Simon)

[The plaintiff, an English company, sued the defendant, a German company with no assets in England, on two bills of exchange that were drawn, negotiated and payable in England. Just before the limitation period under English law expired, the plaintiff sued in the District Court of Munich. The German court dismissed the action on the ground that the limitation period under German law had expired. The plaintiff began another action in England and the defendant moved to have its set aside.

NOTES

1. If we are going to understand the judgment and what it means we have to get behind the German judgment and ask what it really decided. To do this we have to consider the purpose of a limitation period. One stated purpose of such a rule is given by the Ontario Law Reform Commission, *Report on Limitation of Actions*, 1969, at p. 9:

> Lawsuits should be brought within a reasonable time. This is the policy behind limitation statutes. These laws are designed to prevent persons from beginning actions once that reasonable time has passed. Underlying the policy is a recognition that it is not fair that an individual should be subject indefinitely to the threat of being sued over a particular matter. Nor is it in the interests of the community that disputes should be capable of dragging on interminably. Furthermore, evidentiary problems are likely to arise as time passes. Witnesses become forgetful or die: documents may be lost or destroyed. Certainly, it is desirable that, at some point, there should be an end to the possibility of litigation in any dispute. A statute of limitation is sometimes referred to as an "Act of Peace".

2. To what extent does the decision of the German court represent a decision based on the need for a purposive application of the German legislation? If the German court was not making a purposive application, what was it doing? If we don't know what the German court was doing, how can we possibly make sense of what effect the judgment should have?

3. If, on the other hand, the German court was saying that the plaintiff's action should be barred because any other result would be unfair to the defendant, then surely the judgment should be recognized as a disposition of the merits of the case. The plaintiff, by choosing the German court and by taking the risks associated with that choice, cannot reasonably complain if the court decides that its action is unfair to the defendant.

4. The next case is the most recent pronouncement of the Supreme Court of Canada. In our opinion, it has radically changed the law.

De Savoye v. Morguard Investments Limited et al
[1991] 3 S.C.R. 1077, [1991] 2 W.W.R. 217, 76 D.L.R. (4th) 256.
(S.C.C. Dickson C.J., La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory and McLachlin JJ.)

The judgment of the Court was delivered by

LA FOREST J.:-- This appeal concerns the recognition to be given by the courts in one province to a judgment of the courts in another province in a personal action brought in the latter province at a time when the defendant did not live there. Specifically, the appeal deals with judgments granted in foreclosure proceedings for deficiencies on sale of mortgaged property.

> is no basis in these circumstances for this court to direct the re-trial of the issues on the merits.
>
> **Conclusion**
>
> The award of the arbitrator filed with this court is therefore recognized by this court under article 35 of the Ontario Act, and may be enforced in accordance with s. 11 of that Act.

NOTES

1. The reasons of Feldman J. make reference to *Northern Sales* (as yet unreported), the first decision of the Federal Court of Appeal to deal with the New York Convention and its implementing legislation. In addition to upholding the constitutionality of the federal implementing act, the court held that the enforceability of the award was not affected by the fact that the plaintiff's cause of action was statute barred in England (where the arbitration took place) at the time his enforcement action was commenced in Canada. It would appear that initial Canadian decisions under the convention are giving effect to the hope expressed by Graham, *supra*, that the legislation be interpreted broadly so as to promote the practice of arbitration.

2. In *Zodiak International Productions Inc. v. Polish People's Republic*, [1983] 1 S.C.R. 529, 47 N.R. 321, well before the decision in *Morguard*, the Supreme Court enforced a foreign arbitral award in circumstances where it would not have enforced a foreign judgment.

(c) Other Provincial Legislation

There are other methods by which foreign judgments may be given extraterritorial effect. Thus the *Highway Traffic Act*, R.S.O. 1990, c. H.8, provides:

> 198. — (1) The driver's licence of every person who fails to satisfy a judgment rendered against him or her by any court in Ontario that has become final by affirmation on appeal or by expiry without appeal of the time allowed for appeal, for damages on account of injury to or the death of any person, or on account of damage to property, occasioned by a motor vehicle, within fifteen days from the date upon which such judgment became final shall be suspended by the Registrar upon receiving a certificate of such final judgment from the court in which the same is rendered and after fifteen days notice has been sent to such person of intention to suspend his or her licence unless such judgment is satisfied within such period, and shall remain so suspended and shall not at any time thereafter be renewed, nor shall any new driver's licence be thereafter issued to such person, until such judgment is satisfied or discharged, otherwise than by a discharge in bankruptcy, to the extent of the minimum limits of liability required by the *Insurance Act* in respect of motor vehicle liability policies.
>
> . . .

> (4) The Lieutenant Governor in Council, upon the report of the Minister that a province or state has enacted legislation similar in effect to subsection (1) and that such legislation extends and applies to judgments rendered and become final against residents of that province or state by any court of competent jurisdiction in Ontario, may declare that the provisions of subsection (1) shall extend and apply to judgments rendered and become final against residents of Ontario by any court of competent jurisdiction in such province or state.

There is similar legislation in other provinces: *Motor Vehicle Act*, R.S.B.C. 1979, c. 288, s. 95, *Motor Vehicle Act*, R.S.N.S. 1989, c. 293, s. 205 (2). The power of the Registrar was upheld in *Re Thomaes and Registrar of Motor Vehicles* (1977), 18 O.R. (2d) 219, 82 D.L.R. (3d) 305 (Div. Ct.) where a driver's licence was suspended because of the driver's failure to pay damages awarded against him in an action in New York. The fact that the New York judgment would not have been recognized or enforced at common law was irrelevant.

The various provincial insurance acts have provisions designed to alleviate some of the strictness of the pre-*Morguard* enforcement regime by giving the plaintiff a direct right of action against the insurer. (This may explain why the Alberta defendant in a case like *Robinson v. Warren*, *supra*, chose to appear in the Nova Scotia action.) Ontario's *Insurance Act*, R.S.O. 1990, c. I.8, which we have already mentioned, will serve as an example:

> 258(1) Any person who has a claim against an insured for which indemnity is provided by a contract evidenced by a motor vehicle liability policy, notwithstanding that such person is not a party to the contract, may, upon recovering a judgment therefor in any province or territory of Canada against the insured, have the insurance money payable under the contract applied in or towards satisfaction of the judgment and of any other judgments or claims against the insured covered by the contract and may, on behalf of all persons having such judgments or claims, maintain an action against the insurer to have the money so applied.
>
> (2) No action shall be brought against an insurer under subsection 1 after the expiration of one year from the final determination of the action against the insured, including appeals if any.

The insurance legislation of the various provinces is very nearly uniform on this point: see British Columbia's *Insurance Act*, R.S.B.C. 1979, c. 200, s. 252(1) & (2), and Nova Scotia's *Insurance Act*, R.S.N.S. 1989, c. 231, s. 133 (1) & (2).